No. 18503

In the United States Court of Appeals for the Ninth Circuit

MARK PITTMAN, ETC., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal From The United States District Court For The Northern District of California, Southern Division

BRIEF FOR THE UNITED STATES

JOHN W. DOUGLAS,
Assistant Attorney General.

CECIL F. POOLE,
United States Attorney

SHERMAN L. COHN,
PAULINE B. HELLER,
Attorneys,
Department of Justice
Washington, D. C.

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BRIEF FOR THE UNITED STATES

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Suit herein was filed on December 18, 1961, under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) for damages for injuries sustained by a minor on July 13, 1959. The Government moved to dismiss on the ground the action was barred by the two year time limitation provided in 28 U.S.C. 2401(b) for tort actions. The district court dismissed the suit by order entered on November 27, 1962.

The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action, under the Federal Tort Claims Act, for damages for personal injury to a 9 year old minor, was brought by the father of the minor, as guardian *ad litem*, and arises out of an accident involving a Government vehicle. The accident occurred on July 13, 1959. Suit was filed on December 18, 1961. The Government's motion to dismiss, on the ground the action was barred by the two year time limitation provided in 28 U.S.C. 2401(b) for tort actions, was granted by the district court and judgment was entered for the defendent on November 27, 1962. The plaintiff has appealed. The only question for review by this Court is whether the court below erred in holding the action barred under 28 U.S.C. 2401(b). It is the Government's position that the district court committed no error and that its decision is plainly correct.

QUESTION PRESENTED

Whether a tort suit brought on behalf of a minor who was injured more than two years before the commencement of the action was properly dismissed by the district court, as barred under 28 U.S.C. 2401(b), prescribing that "a tort action against the United States shall be forever barred unless action is begun within two years after such claim accrues."

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, * * *.

28 U.S.C. 2401 provides in subsection (a):

§ 2401. Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

ARGUMENT

Summary of Argument

Under the express terms of the Federal Tort Claims Act and the cases arising thereunder, it is clear that the two year time limitation in the Act (28 U.S.C. 2401(b)) is a jurisdictional condition precedent in all tort cases against the United States and bars the suit herein. There is no merit to appellant's contention that a 6 year time limitation is applicable in this tort suit.

It is also incontrovertibly clear, under the terms of the statute and the cases, that the two year time limitation for tort suits against the United States starts to run at the time of injury, regardless of the infancy of the injured person. The statute provides no tolling of the time limitation in *tort* cases and the courts have consistently and uniformly held that the statute precludes the judiciary from granting extensions of the time for suit because of the infancy of the injured person.

It is also firmly established in the law that the time bar may not be waived or extended by Government officials and that even a misrepresentation by a Government official will not estop the Government from invoking the time bar. Indeed even if the Government did not invoke, plead, or rely upon the time bar, the court must nevertheless apply it, because, after the two years have run, the court lacks jurisdiction of the matter.

I

The District Court Correctly Held that the Two-Year Time Bar in the Federal Tort Claims Act Applies in this Federal Tort Action.

There is today no room for challenging the traditional and "accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it." *Dalehite* v. *United States*, 346 U.S. 15, 30; *Feres* v. *United States*, 340 U.S. 135, 139; *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *Eckford*, 6 Wall. (73 U.S.) 484. Nor can there be any question at this date of the right of Congress to impose any condition it desires upon waiver of sovereign immunity. *Soriano* v. *United States*, 352 U.S. 270, 276-77; *Munro* v. *United States*, 303 U.S. 36, 41; *McElrath* v. *United States*, 102 U.S. 426, 440. This settled principle has been applied to the Federal Tort Claims Act. See *Dalehite* v. *United States*, 346 U.S. at 31; *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10); *Simon* v. *United States*, 244 F. 2d 703, 704 (C.A. 5).

Prior to 1946, with certain limited exceptions, the Federal Government had an "all-encompassing immunity from tort actions." *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319. In 1946 Congress enacted the Federal Tort Claims Act and, "subject to the provisions of this Act," [1] thereby "waived sovereign

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[1] Section 410 of the Federal Tort Claims Act as enacted, 60 Stat. 843. This language was omitted in the 1948 reenactment of the federal judicial code in pursuance of the policy of eliminating superflous language. See H. Rep. 308, 80th Cong., 1st Sess., p. 5; *United States* v. *John Hancock Life Ins. Co.*, 364 U.S. 301, 308-09.

immunity from suit for certain specified torts of federal employees." *Dalehite* v. *United States*, 346 U.S. at 17. In addition to excepting certain torts from the coverage of the Act (see 28 U.S.C. 2680), Congress also attached certain conditions to its waiver of sovereign immunity. One of these conditions, embodied first in section 420 of the Act as originally enacted, was a time limitation within which an action could be commenced. 60 Stat. 845. This limitation was at first one year. It was later extended to two years. 63 Stat. 62. Although as originally enacted it was codified as section 942 of the Judicial Code (Title 28, 1946 ed.), in the 1948 reenactment of the Code it was placed in 28 U.S.C. 2401(b) adjacent to the limitation provision applicable to other civil actions against the United States. 28 U.S.C. 2401(a).[2]

The plaintiff-appellant's contention (Br. pp. 15-28), that the six year time limitation in 28 U.S.C. 2401(a) is applicable in this *tort* action is clearly without merit. In *United States* v. *Glenn*, 231 F. 2d 884 (C.A. 9), certiorari denied 352 U.S. 926, this Court, after a careful analysis of the legislative history as well as the structure and content of sections 2401(a) and 2401(b), properly concluded that section 2401(a), arising out of the Tucker Act, has no applicability to tort suits; that section 2401(b) applies to tort suits; and that the two sections are not to be commingled, but are "*mutually exclusive.*" The Fifth

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[2] The reviser's note states that all that was intended was a consolidation and simplification "without change of substance." See note to 28 U.S.C. 2401.

Circuit reached a similar decision in *Simon* v. *United States*, 244 F. 2d 703 (C.A. 5). The same conclusion was reached in *Morton* v. *United States*, 185 F. Supp. 211 (E.D. Ill.). No case has been found which has applied the six year limitation period of section 2401(a) in a federal tort suit. Indeed the plaintiff-appellant cites none.

II

The Two Year Time Bar Started to Run at the Time of of the Injury to the Minor Plaintiff and Bars the Suit Herein; Infancy Does Not Toll the Time Limitation.

It is well settled that the two year time bar for tort claims against the United States starts to run at the time of the injury caused by the asserted negligence. *United States* v. *Glenn*, 231 F. 2d 884 (C.A. 9), certiorari denied 352 U.S. 926; *Carnes* v. *United States*, 186 F. 2d 648 (C.A. 10); *Simon* v. *United States*, 244 F. 2d 703 (C.A. 5).[3] There is no tolling of the two year time limitation because of the infancy of the injured person. *United States* v. *Glenn*, *Simon* v. *United States*, *Carnes* v. *United States*, and *Morton* v. *United States* all *supra*. See also *Whalen* v. *United States*, 107 F. Supp. 112 (E.D. Pa.); *Foote* v. *Public Housing Commissioner of the United States*, 107 F. Supp. 270 (W.D. Mich.); *Morgan* v. *United States*, 143 F. Supp. 580 (D.N.J.); *Levitch* v. *United*

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[3] The only exception to this rule is the situation where the negligence is not known or susceptible of ascertainment by the exercise of reasonable diligence. See *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9). But cf. *Tessier* v. *United States*, 269 F. 2d 305 (C.A. 1).

States, 114 F. Supp. 572 (W.D. Nev.); *Finn* v. *United States*, 152 F. Supp. 721 (E.D.N.Y.); *Lomax* v. *United States*, 155 F. Supp. 354 (E.D. Pa.). In *Sgambati* v. *United States*, 172 F. 2d 297 (C.A. 2), certiorari denied 337 U.S. 938, the Court of Appeals for the Second Circuit, in refusing to extend or toll the time limitation for a minor tort claimant under the Federal Tort Claims Act, pointed out that the plaintiff could have sued by a next friend within the statutory normal period, 172 F. 2d at 298. The situation is no diffffferent here. The district court was available at all times to minor Pittman's father during the two years following his purported injury at the hands of Government employees and suit could as readily have been brought by him then, as it has been now. The delay was not occasioned by any legal disability on the part of the son, but merely by the inaction of the parent.[4]

This court squarely, clearly, and correctly held in the *Glenn* case, *supra*, that the infancy of the injured person does not extend or toll the two year time bar. That holding accords with the terms of the statute and its legislative history as well as the decided cases. In the *Glenn* case, this Court pointed out that there is no express provision for tolling the time limitation period in tort cases because of legal disability; that the structure and content of Section 2401 show that a tolling of the time limitation was provided for

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[4] The father's asserted reluctance to sue because of his position in the armed forces could not extend the time for suit on behalf of his son any more than it would extend the time for suit had the father himself suffered the injuries.

contract cases but not for tort cases and that this was intentionally done; that the legislative history of the Federal Tort Claims Act reflects the policy of Congress to provide a short time period for bringing suits in tort—a policy based on reason and equity and a realization that tort claims are generally almost entirely reliant on transient witnesses and fading memories. Plaintiff-appellant's theory, which would enable a guardian or a minor, wholly at his own pleasure or convenience, to wait up to 20 years (or more) before filing a suit would thwart the congressional policy and intent. Particularly where the Government is the defendant, and, in the magnitude of its operations, may be wholly unaware until suit is started, that injuries have occurred, the difficulty in defending tort actions becomes progressively insurmountable as the time between accident and lawsuit increases. It is apparent that the congressional conclusion that a reasonable defense is possible only when actions are brought within two years of the time when the cause first accrues, and a suit may be brought, is a sound one. See H.R. 1754, 80th Cong., 2d Sess., p. 4. Cf. Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 7236, 76th Cong., 3rd Sess., 21.

In the light of the congressional policy to fix a short time period for bringing tort suits, appellant's statistics with respect to the large number of legal infants among the population merely underscores the necessity for applying the two year period which the Congress established, without exception, as expressly provided in the statute. In any event, appellant's

argument as to the wisdom of the congressional limitation should be made to Congress.

An examination of other federal statutes, under which tort actions are permitted, demonstrates that it has been the consistent policy of Congress, with respect to tort actions, that infancy of the injured person does not extend the time limitation. See e.g., Suits in Admiralty Act, 47 Stat. 420, 46 U.S.C. 745; Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 782; Jones Act, 41 Stat. 1007, 46 U.S.C. 688, Carriage of Goods by Sea Act, 49 Stat. 1207, 1208, 46 U.S.C. 1303; Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. 56. The courts have consistently rejected attempts judicially to modify those acts by applying extensions for disability or even for fraud or concealment. See *Sgambati* v. *United States*, 172 F. 2d 297 (C.A. 2), certiorari denied 337 U.S. 938 (Suits in Admiralty Act or Public Vessels Act) (infancy); *Kalil* v. *United States*, 107 F. Supp. 966, 967 (E.D.N.Y.) (Suits in Admiralty Act) (insanity); *Williams* v. *United States*, 133 F. Supp. 317 (E.D. Va.), aff'd. 228 F. 2d 129, certiorari denied 351 U.S. 986, rehearing denied 352 U.S. 860. (Suits in Admiralty Act) (insanity); *Damiano* v. *Pa. R.R. Co.*, 161 F. 2d 534 (C.A. 3), certiorari denied 332 U.S. 762 (Federal Employees' Liability Act) (fraud or concealment); *Wahlgren* v. *Standard Oil Co. of N.J.*, 42 F. Supp. 992, 993 (S.D.N.Y.) (Jones Act) (disability); *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569, 572 (C.A. 8) (FELA) (fraud); *Pollen* v. *Ford Instrument Co.*, 108 F. 2d 762, 763 (C.A. 2) (Patent Infringement) (Fraud or Concealment).

There is clearly no merit to plaintiff-appellant's claim that the cause of action does not accrue and the statute of limitations does not start to run until the appointment of a guardian *ad litem*. This is merely another way of saying that infancy tolls the statute—a proposition which this Court expressly rejected in the *Glenn* case, *supra*, and which has been uniformly and consistently rejected by all other federal courts that have considered the question. In this connection, the Court's attention is directed to the decision and rationale of the United States Supreme Court in *Reading Co.* v. *Koons*, 271 U.S. 58. In that case, an action was brought under the Federal Employees' Liability Act for a death which had occurred on April 23, 1915. Letters of administration were issued on September 23, 1921, and the action was brought on February 6, 1922. It was claimed that the cause of action accrued upon the date of appointment of the administrator—a claim parallel to the claim in the instant case that the cause of action accrued upon the appointment of a guardian *ad litem*. The Supreme Court rejected this reasoning and held that the time to sue runs, not from the appointment of an administrator, but from the time of the injury. The Supreme Court said (271 U.S. at 65):

> The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation. If the persons who are designated beneficiaries of the right of action created may choose their own time for applying for the appointment of an administrator and consequently for setting the statute running, the

> two-year period of limitation so far as it applied to actions for wrongful death might as well have been omitted from the statute. An interpretation of a statute purporting to set a definite limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose. There is nothing in the language of the statute to require, or indeed to support, such an interpretation.

See also *Pflugh* v. *United States*, 124 F. Supp. 607 (W.D. Pa.).; *Foote* v. *Public Housing Commissioner*, 107 F. Supp. 270 (W.D. Mich.); cf. *Piascik* v. *United States*, 65 F. Supp. 430 (S.D.N.Y.). The reasoning of the Supreme Court is equally applicable to the case at bar.

III

The Government Is Not Estopped From Relying Upon the Statutory Two Year Time Bar

The two year statute of limitations in the Federal Tort Claims Act is jurisdictional and must be rigorously adhered to by the court. The Supreme Court, in *Munro* v. *United States*, 303 U.S. 36, 41, has clearly enunciated the applicable principle.

> Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reed* v. *United States*, 211 U.S. 529, 538 * * *.
>
> The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Finn* v. *United States*, 123 U.S. 227, 233.

See also *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, where the Court held that administrative regulations precluded recovery even if the plaintiff had been misled by representations of the Government's agents; and *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187 where it was stated that "no action of the Commissioner [of Internal Revenue] can change or modify the conditions under which the United States consents to the running of the statute of limitations against it." And see *United States* v. *San Francisco*, 310 U.S. 16, 32, quoting from *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409: "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." [5]

This Court has similarly held that a federal statutory time bar is jurisdictional. *Edwards* v. *United States*, 163 F. 2d 268 (C. A. 9), citing *Munro* v. *United States*, 303 U.S. 36, *Reid* v. *United States*, 211 U.S. 529, and *Finn* v. *United States*, 123 U.S. 227; *Humphreys* v. *United States*, 272 F. 2d 411 (C.A. 9). Such a time bar cannot be waived by Government officials; it applies whether or not pleaded; and where the statutory time has run, the court must dismiss the case. *Finn* v. *United States*, 123 U.S. 227; *Lomax* v. *United States*, 155 F. Supp. 354 (ED. Pa); cf. *McIndoe* v. *United States*, 194 F. 2d 603 (C.A. 9); *United States* v. *West*, 232 F. 2d 694 (C.A. 9), cer-

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[5] Plaintiff-appellant's reliance upon *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, is misplaced, as that case did *not* involve a suit against the United States Government.

tiorari denied 352 U.S. 834. Thus the court below correctly held that a representation [6] by a government official does not estop the Government from the defense of the statutory time bar. This decision is a sound one and accords with the case law.[7]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOHN W. DOUGLAS,
Assistant Attorney General.

CECIL F. POOLE,
United States Attorney

SHERMAN L. COHN,
PAULINE B. HELLER,
Attorneys,
Department of Justice
Washington, D. C.

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[6] Of course, a misrepresentation by a government official cannot form the basis for a federal tort action, as the statute expressly excepts claims founded on misrepresentation. 28 U.S.C. 2680(h); *United States* v. *Neustadt,* 366 U.S. 696; *Clark* v. *United States,* 218 F. 2d 446 (C.A. 9).

[7] We agree with the court below that the pleadings fail to state an appropriate claim of estoppal. However, this is immaterial. Even if well pleaded, such an allegation will not support the cause of action.

Certificate

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Pauline B. Heller
Attorney for Respondent.

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